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No. 84-972

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JAMES BARTON,

Petitioner,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Fifth Judicial District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether dismissal of an indictment based on a claim of prosecutorial misconduct is required where petitioner has not demonstrated any degree of prejudice resulting therefrom.

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OPINION BELOW

The opinion of the Illinois Appellate Court, Fifth District, is reported at *People v. Barton*, 122 Ill. App. 3d 1079, 462 N.E.2d 538 (5th Dist. 1984). The opinion has been submitted to this Court as an Appendix to the Petition for Writ of Certiorari and, therefore, is not contained in this Brief in Opposition.

JURISDICTION

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1257(3).

STATEMENT OF THE CASE

Petitioner, James Barton, was indicted by the Madison County, Illinois, grand jury on two counts of bribery, one count of conspiracy to commit bribery, and one count of official misconduct. The circuit court, on petitioner's motion, dismissed the indictment because of prosecutorial misconduct.

The respondent appealed from the dismissal of the indictment. The Illinois Appellate Court, Fifth District, reversed the judgment of the circuit court and remanded the cause for further proceedings. *People v. Barton*, 122 Ill. App. 3d 1079, 462 N.E.2d 538 (5th Dist. 1984).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The respondent respectfully requests this Court to deny the Petition for Writ of Certiorari to review the decision of the Illinois Appellate Court, Fifth District, insofar as petitioner does not raise a question of constitutional proportion that is worthy of review. In seeking a writ of certiorari petitioner advances the claims 1) whether prosecutorial misconduct can violate due process even if it does not directly affect the evidence, and 2) whether dismissal of an indictment is an appropriate remedy for such prosecutorial misconduct. Respondent maintains further review of this cause is unnecessary in that the decision below does not depart from established federal precedent. Dismissal of an indictment based on a claim of prosecutorial misconduct is not required where petitioner has not demonstrated any degree of prejudice resulting therefrom. The appellate court fully considered and correctly decided the issue. Respondent further maintains it would not be prudent for this Court to grant certiorari on an issue of limited impact for future litigants.

Petitioner, by way of this petition, claims that he was denied due process of law by the conduct of the Madison County State's Attorney. As a result of the misconduct, petitioner contends that the remedy is the dismissal of the indictment against the petitioner. The respondent submits that petitioner's position is not supported by case authority. Indictments can only be dismissed upon a showing of "demonstrated and longstanding prosecutorial misconduct" as well as a showing of prejudice to the defendant. *United States v. Lamoureux*, 711 F.2d 745, 747 (6th Cir. 1983); *United States v. Smith*, 687 F.2d 147, 153 (6th

Cir. 1982). Prejudice of sufficient magnitude to justify dismissing an indictment must have or threaten "some adverse effect upon the effectiveness of counsel's representation or [produce] some other prejudice to the defense." *United States v. Morrison*, 449 U.S. 361, 365 (1981).

Petitioner's reliance on *United States v. Armijo-Martinez*, 669 F.2d 1131 (6th Cir. 1982), is clearly misplaced. (Petition for Writ at 17) In *Armijo-Martinez*, the question presented was whether the Government may, by its unilateral action, make material witnesses in a criminal prosecution unavailable to the defendant. The court held that the sixth amendment compulsory process rights of the defendants, who were charged with transporting eighteen illegal aliens, were violated when the Government offered fourteen of the aliens voluntary departure and paid the expenses of their return to Mexico before counsel for the defendants had an opportunity to interview them. Because the defendants' right to compulsory process had been violated, dismissal of the indictments was required where the defendants were able to demonstrate a very low threshold of prejudice. The respondent submits the decision in *Armijo-Martinez* lacks any precedential value on the standard of prejudice in that the judgment was vacated and remanded by this Court in *United States v. Armijo-Martinez*, 459 U.S. 810 (1982), for further consideration in light of *United States v. Valenzuela-Pernal*, 458 U.S. 858 (1982).

Petitioner's further reliance on *United States v. Gouveia*, 704 F.2d 1116 (9th Cir. 1983), is also misplaced. (Petition for Writ at 17) In *Gouveia*, the court held that federal prison inmates who were in isolation for periods ranging from eight to twenty months on suspicion of murder, and who were denied appointment of counsel during that period, were entitled to dismissal of the indictments.

However, this Court in *United States v. Gouveia*, ____ U.S. ____, ____, 104 S.Ct. 2292, 2299 (1984), reversed the judgment of the lower court and held that the concerns of the court of appeals "while certainly legitimate ones, are simply not concerns implicating the right to counsel and we reaffirm that the mere 'possibility of prejudice [to a defendant resulting from the passage of time] . . . is not itself sufficient reason to wrench the Sixth Amendment from its proper context.' "

Petitioner in the case at bar seeks to have this Court articulate a standard for the dismissal of an indictment which rejects the requirement of prejudice. In light of the positions most recently taken by this Court in *United States v. Armijo-Martinez* and *United States v. Gouveia*, petitioner's claim has been implicitly rejected.

With respect to petitioner's claim as to the propriety of dismissal of the indictment due to pretrial publicity, respondent maintains that the extreme remedy of dismissal of an indictment before a *voir dire* is not warranted. Courts have emphasized the efficacy of *voir dire* in cases, *Abscam* and *Watergate*, involving far more extensive publicity than occurred here. *Application of National Broadcasting Co.*, 635 F.2d 945, 953 (2d Cir. 1980). If a *voir dire* should reveal that the publicity had created a taint, a remedy such as a change of venue would be more appropriate than dismissal. In the absence of any evidence indicating that petitioner has been prejudiced by the publicity in this case, dismissal of the indictment is not an appropriate remedy. *Beck v. Washington*, 369 U.S. 541 (1962). Petitioner is not entitled to permanent immunity from prosecution respecting his alleged criminal conduct.

In *United States v. Stanford*, 589 F.2d 285 (7th Cir. 1978), while defendants claimed prosecutorial misconduct in that the United States Attorney allegedly intentional-

ly generated prejudicial pretrial publicity, defendants failed to show prejudice resulting therefrom. Consequently, the court held dismissal of the indictments was not required. In the case at bar, the Illinois appellate court fully considered the facts in view of *United States v. Stanford* and Illinois decisional law. Based upon federal and state court precedent, the appellate court held that there was insufficient proof that the conduct of the Madison County State's Attorney resulted in the denial of due process so as to warrant a pretrial dismissal of the criminal proceedings.

CONCLUSION

In view of the foregoing reasons, respondent respectfully requests the petition for writ of certiorari be denied.

Respectfully submitted,

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